

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>FRANK R. THOMAS</b>	)	
Claimant	)	
VS.	)	
	)	
<b>DISTRICT LODGE 70</b>	)	Docket No. 1,010,813
Respondent	)	
AND	)	
	)	
<b>ULICO CASUALTY COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the July 25, 2005 Award of Administrative Law Judge John D. Clark. Claimant was awarded benefits for injuries suffered on June 28, 2002, while in respondent's employ. The Appeals Board (Board) held oral argument on November 29, 2005.

**APPEARANCES**

Claimant appeared by his attorney, Dennis L. Phelps of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas R. Sell of Olathe, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). In addition, at oral argument, the parties stipulated that the discovery deposition of claimant, taken September 15, 2003, is part of the record for the purposes of this appeal.

**ISSUES**

1. Did claimant suffer accidental injury arising out of and in the course of his employment or is claimant's condition a temporary aggravation of a preexisting condition/injury from a prior auto accident?
2. What is the nature and extent of claimant's injury and disability? More particularly, did claimant put forth a good faith effort to obtain post-injury employment?
3. Is the medical deposition of C. Reiff Brown, M.D., taken April 12, 2005, properly in evidence or should it be excluded due to claimant's attorney's ex parte contact with Dr. Brown?
4. Is claimant entitled to authorized and unauthorized medical reimbursement?
5. Did the ALJ commit error in appointing Dr. Brown for the independent medical examination? The parties acknowledge this issue was not presented to the ALJ, but is being presented to the Workers Compensation Board as a question of first impression.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be set aside and the matter remanded to the ALJ with instructions.

Claimant alleges accidental injury arising out of and in the course of his employment on June 28, 2002. On that day, claimant, who was a janitor for respondent, was performing floor waxing and furniture moving activities when he developed pain. Claimant left work that day, but by the time he got home, he knew he had suffered an injury. He was experiencing severe pain in his upper back, shoulders, neck and arms. The following Monday, claimant reported his injury to his boss, Judy Pierce (respondent's secretary/treasurer), and requested that he be sent to a doctor. Ms. Pierce instructed claimant to go to a doctor, and claimant went to his family doctor, Andrew Barclay, M.D., on July 2, 2002. Claimant was taken off work for 30 days in order to rest. Dr. Barclay subsequently referred claimant to Pedro A. Murati, M.D., for conservative treatment. Claimant underwent conservative treatment with Dr. Murati, ultimately being referred for a functional capacity evaluation (FCE) on May 6, 2003. At some point, Dr. Murati released claimant with restrictions based upon that FCE.

As a result of the dispute regarding claimant's condition, the ALJ referred claimant to board certified neurological surgeon Paul S. Stein, M.D., for an independent medical examination. The ALJ's Order, which is dated June 26, 2003, specifies "[c]ounsel shall prepare and submit a joint letter to Dr. Stein."

Dr. Stein, on September 25, 2003, provided a letter to both claimant and respondent attorneys, advising that claimant had missed scheduled independent examinations on three separate occasions. On July 19, 2004, the ALJ then referred claimant to C. Reiff Brown, M.D., for an independent medical examination. The Order of the ALJ on that date states:

Independent medical examination by C. Reiff Brown, M.D.

IT IS SO ORDERED.

No instructions were attached to the July 19, 2004 Order. The claimant and respondent attorneys apparently, in following the instructions provided by the ALJ from the Order of referral to Dr. Stein, submitted a joint letter to Dr. Brown dated September 9, 2004. That letter to Dr. Brown, which both attorneys signed, instructed Dr. Brown as follows:

The Honorable John C. Clark has appointed you as an independent medical examiner in the above-mentioned Kansas Workers' Compensation case. An appointment for your examination of the claimant, Frank Thomas, has been scheduled with your office for Monday, September 13th, at 3:00 p.m. **Under Judge Clark's Order, the attorneys are only to have contact with you by correspondence signed by both attorneys or by a conference call with all counsel participating.**

Dr. Brown's deposition was then scheduled for April 12, 2005, with claimant scheduling the deposition. At the time of the taking of the deposition, when respondent's attorney arrived, claimant's attorney was in conference with Dr. Brown and apparently stayed in conference with Dr. Brown exclusive of respondent's attorney for 30 to 45 minutes. At the time of that deposition, respondent's attorney made the following objection:

MR. ALBERG: Before we go on the record, I want to put an objection on the record. This is the court-ordered neutral physician. Counsel has been in here prepping him for I would say at least 45 minutes. Improper under the rules and I'm going to move to strike the doctor's report and testimony in this case. I'm making an objection to the evidence. He is the court-ordered neutral doctor and is not to

be prepped by anyone prior to an exam or prior to a deposition. That's all I have to say and I'm moving to strike.<sup>1</sup>

The deposition of Dr. Brown then proceeded, with respondent's attorney raising the issue to the ALJ, who, in the Award, did not address respondent's objection to the deposition of Dr. Brown.

The Board considered a similar situation in *Birmingham*.<sup>2</sup> In *Birmingham*, respondent's attorney contacted the court-ordered independent medical examining doctor, David A. Tillema, M.D., after the doctor had performed an independent medical examination. The attorney contact was ex parte, at which time respondent's attorney provided Dr. Tillema with a copy of a surveillance videotape of the claimant. As a result of viewing the videotape, Dr. Tillema changed his opinion regarding claimant's functional impairment, reducing the functional impairment from 8 percent to the body to 5 percent to the body.

The Board, in *Birmingham*, elected to exclude the testimony of Dr. Tillema, finding the ex parte contact between respondent's attorney and Dr. Tillema violated the Order of the administrative law judge regarding what, if any, contact was allowed by the attorneys with Dr. Tillema, the court-ordered independent medical examining doctor. The Board, however, did find, in *Birmingham*, that the contact between respondent's attorney and Dr. Tillema, which did not occur until May 1, 1997, after Dr. Tillema's July 25, 1996 report was completed, did not taint the original independent medical examination report and the report was allowed to be considered in that record.

Here, the Board finds the joint letter submitted by the parties on September 9, 2004, pursuant to the instructions of the ALJ, to be the law of the case. The attorneys were only to have contact with Dr. Brown "by correspondence signed by both attorneys or by a conference call with all counsel participating." The contact by claimant's attorney prior to the deposition of Dr. Brown may have tainted Dr. Brown's testimony with regard to claimant's current condition and its relationship to the numerous difficulties claimant suffered from his earlier injuries and accidents.

Respondent further contends that the report of Dr. Brown should be excluded, as there are numerous entries in the report which conflict with claimant's prior testimony. Respondent contends that it would be unduly prejudicial for the report of Dr. Brown to be allowed into evidence without the opportunity to cross-examine Dr. Brown. At the same

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<sup>1</sup> Brown Depo. at 4-5.

<sup>2</sup> *Birmingham v. Deffenbaugh Disposal Services*, No. 208,094, 1999 WL 292835 (Kan. WCAB Apr. 30, 1999).

time, respondent argues its opportunity to cross-examine was compromised by the inappropriate contact between Dr. Brown and claimant's attorney. The Board agrees with respondent on both counts. As the law of this case prohibited the attorneys from having contact with Dr. Brown unless the contact was joint, the contact by claimant's attorney prior to the deposition was inappropriate and could have improperly influenced Dr. Brown in his testimony regarding claimant's injuries and current conditions, as well as his preexisting limitations and injuries. The Board, therefore, finds that both the deposition and the report of Dr. Brown are to be excluded from this case.

The Board acknowledges that this situation is somewhat different than that found in *Birmingham*. In *Birmingham*, Dr. Tillema was not the only health care provider to testify. Additionally, the utilization of Dr. Tillema's report did not create the prejudicial circumstance that exists in this matter. Therefore, medical information and evidence were available in *Birmingham*, which allowed the case to proceed.

In this instance, the exclusion of Dr. Brown's testimony excludes the only medical deposition taken in this case. The Board, therefore, determines that this matter be remanded to the ALJ<sup>3</sup> with instructions that claimant be referred for an independent medical examination to a doctor of the ALJ's choice, with the ALJ to again instruct the attorneys regarding the specific rules as to what, if any, contact is or is not allowed between the attorneys and the independent medical examining health care provider.

This decision renders moot the remaining issues raised herein.

The Board does not retain jurisdiction over this matter. Any future awards or orders issued by the ALJ must be appealed to the Board pursuant to the Kansas Workers Compensation Act.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the above matter be reversed and remanded to Administrative Law Judge John D. Clark, with instructions that claimant be referred for an independent medical examination to a doctor of the Administrative Law Judge's choice, with the Administrative Law Judge to provide specific rules regarding what, if any, contact will or will not be allowed between the attorneys and the independent examining physician.

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<sup>3</sup> K.S.A. 2004 Supp. 44-551(b)(1).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant  
Douglas R. Sell, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director